# In the matter of WMC Resources Limited
# [2005] ATP 3

**Catchwords:**
*Target's statement ;"effective" value; discounting stated bid consideration for dividends or other distributions; accrued value of distributions; disclosure of basis of expert's valuation; expert report; "stand alone" valuation; valuation of synergies; premium for control; misleading statements; assumptions used in valuation; commodity and exchange rate assumptions; comparison of offer price with historic share prices; use of directors' forecast assumptions by expert to cross check valuation; cross references to summary of expert's report; reporting of company profits; earnings forecasts; inclusion of normalized earnings with headline figures; supplementary target's statement; undertaking for corrective statement;*

Corporations Act (2001) *Cth.* section 638(1),
Guidance Note 16 – Corrective Statements

**These are the Panel's reasons for accepting an undertaking from WMC to dispatch a supplementary target's statement to its shareholders explaining the relationship between Xstrata's offer price and possible future distributions by WMC. These are also the Panel's reasons for declining the rest of Xstrata's application in relation to WMC's target's statement, and for declining to make a declaration of unacceptable circumstances in relation to WMC's application concerning a media release published by Xstrata on 4 January 2005.**

**SUMMARY**

1. The Panel received two applications within a short period of time in relation to the affairs of WMC Resources Limited (**WMC**). Both related to a takeover offer by a subsidiary[1] of Xstrata plc (**Xstrata**) for all of the shares in WMC which Xstrata had announced on 22 November 2004. The first, from Xstrata on 12 January 2005 (**Xstrata Application**), related to the WMC target's statement dated 4 January 2005 (**WMC Target's Statement**). Xstrata complained of various statements or omissions by WMC in the WMC Target's Statement and by Grant Samuel & Associates Pty Limited (**Grant Samuel**) in an independent expert's report prepared by Grant Samuel to accompany the WMC Target's Statement (**Grant Samuel Report**). The second, from WMC on 14 January 2005 (**WMC Application**), in relation to a media release published by Xstrata on 4 January 2005 commenting on the WMC Target's Statement. The Panel conducted proceedings in relation to both applications concurrently.
2. The Panel accepted an undertaking from WMC to release and dispatch a supplementary target's statement, in a form approved by the Panel, which addressed a concern the Panel had in relation to one of the issues raised by Xstrata in its application. The concern related to disclosures on page 4 of the WMC Target's Statement regarding the "effective" value of Xstrata's offer and

[1] Xstrata Capital Holdings Pty Ltd

comparisons made of that "effective" value with an historical WMC share price. WMC had proposed in the WMC Target's Statement that WMC shareholders should discount the $6.35 cash consideration offered under the Xstrata bid by $0.50 to reflect WMC's intention to give its shareholders a $0.20 per share dividend and a $0.30 per share capital return. WMC then compared the $5.85 which it derived as the "effective" value of the Xstrata offer to the highest market price for WMC shares over the previous 12 months (without any disclosure that the price it used as the comparison was, by then, almost 12 months old).

3. Based on the undertaking provided by WMC, the Panel concluded the proceedings arising from the Xstrata Application on the basis that it was not necessary to make a declaration of unacceptable circumstances and that no order was required.

4. The Panel did not consider that any of the issues raised in the WMC Application constituted unacceptable circumstances, and therefore concluded the proceedings arising from that application without requiring any further action to be taken.

**THE PROCEEDINGS**

5. The Panel received the two applications within two days of each other, after being copied in on a series of correspondences between the parties. It decided to commence proceedings in relation to both applications and to run the proceedings concurrently. The Panel published Media Releases advising that it had decided to commence proceedings in relation to both applications. Normally the Panel does not announce its decision to commence proceedings, but will announce its intention not to commence proceedings. The Panel considers that parties involved in previous proceedings have represented that the Panel's decision to commence proceedings is a form of vindication for their making an application. The Panel considered that the somewhat unusual circumstances of the two applications in this case warranted a deviation from normal practice.

**THE PANEL & PROCESS**

6. The President of the Panel appointed Nerolie Withnall (sitting President), David Gonski (sitting Deputy President) and Simon Withers as the sitting Panel (the **Panel**) for the proceedings (the **Proceedings**) arising from the two applications.

7. There was no request for interim orders, given that both the Xstrata bidder's statement and WMC Target's Statement had already been dispatched to WMC shareholders.

8. The Panel adopted the Panel's published procedural rules for the purposes of the Proceedings.

9. The Panel consented to the parties being legally represented by their commercial lawyers in the Proceedings.

## APPLICATION

### Xstrata Application

10. The Xstrata Application raised a number of concerns regarding the WMC Target's Statement and the independent expert's report prepared by Grant Samuel, which was included in the WMC Target's Statement at Annexure A. Xstrata alleged that:

    (a) *Stand-Alone Valuation* - The front section of the WMC Target's Statement included references to Grant Samuel's valuation of WMC and its conclusions, without an accompanying explanation of the basis on which Grant Samuel assessed the value of WMC shares. The Grant Samuel valuation included *the value of the administrative costs savings that would be available to a bidder for WMC which already has an existing presence in Australia*. Xstrata submitted that the absence of such an accompanying explanation in the front of the WMC Target's Statement wherever the Grant Samuel value was used meant that the Grant Samuel valuation was misleadingly presented in the WMC Target's Statement as a "stand-alone" valuation (meaning a valuation of 100% of WMC which did not take account of any cost savings that may be available to a bidder);

    (b) *Premium for control* - The Grant Samuel valuation of WMC included a premium for control but Grant Samuel did not quantify the premium nor the method by which the amount of premium had been determined, and should have done so;

    (c) *"Effective offer" value* - Page 4 of the WMC Target's Statement referred to an "effective" offer value of $5.85. In presenting this "effective" offer, WMC reduced the amount of what it described as Xstrata's "headline" offer of $6.35 by 50 cents, to take account of an anticipated 2004 final dividend of 20 cents per WMC share and an anticipated capital return of 30 cents per WMC share (together the **Distributions**). The WMC Target's Statement presented this analysis in the form of a graph. In the following paragraph, WMC compared the "effective" offer to an historic WMC trading price of $5.98. Xstrata submitted that this comparison was misleading due to the comparative trading price being too old to be relevant, and the failure to present that trading price on the same discounted basis as the "effective" offer;

    (d) *Grant Samuel's use of WMC directors' forecast and assumptions* - Grant Samuel used its own commodity price and exchange rate assumptions in its valuation of WMC. The WMC directors used higher commodity price and exchange rate assumptions in preparing their 2005 earnings forecast. Grant Samuel then used the WMC directors' 2005 earnings forecast (which incorporated the higher assumptions) in an earnings multiple analysis as a validity check of its valuation of WMC. Xstrata submitted that this use of different assumptions, and the failure to disclose the differing assumptions, rendered Grant Samuel's earnings multiple analysis misleading.

**WMC Application**

11. The WMC Application raised the following concerns about a press release issued by Xstrata on 4 January 2005 (**Xstrata Release**) regarding the WMC Target's Statement and the Grant Samuel report:
    (a) The Xstrata Release contained statements regarding the assumption in Grant Samuel's valuation of "head office and Perth office annual cost savings". WMC submitted that these statements misrepresented the nature of the Grant Samuel valuation and implied that Grant Samuel's valuation methodology was unusual and inappropriate;
    (b) The Xstrata Release contained a "recalculation" of the low point in Grant Samuel's valuation range in an attempt to exclude the impact of the cost savings referred to in that release. WMC submitted that Xstrata's recalculation was inappropriate and irrelevant, and therefore Xstrata's reference to it was misleading;
    (c) The Xstrata Release compared WMC's reporting of its 2004 profit in the WMC Target's Statement to the reporting by WMC of its 2004 profit in an announcement made on 9 December 2004. WMC submitted that in making this comparison, Xstrata had claimed that WMC had changed its position in relation to its 2004 profit, which claim was false and misleading.

**Consideration of issues by the Panel – Xstrata Application**

**"Effective" offer and comparisons with historic share prices**

12. The Panel considered that the disclosure at page 4 of the WMC Target's Statement relating to the "effective" offer value of Xstrata's bid was misleading and constituted unacceptable circumstances.
13. The disclosure on page 4 of the WMC Target's Statement was misleading for two reasons. The first was WMC's use of the terms "Headline" and "effective" in describing the treatment of the proposed Distributions. The second was the comparison of the Xstrata offer price with a materially out of date value.

*"effective offer" and treatment of Distributions*

14. The use of the terms "headline" and "effective" came about in relation to WMC's description to its shareholders of how they should assess Xstrata's offer given that WMC advised that it intended to give its shareholders a \$0.20 per share dividend and a \$0.30 per share return of capital. Under the terms of Xstrata's offer the cash amount given to WMC shareholders would be reduced by the amount of any cash distributions (**Rights**) which attached to or arose from WMC shares after the date of the Xstrata bidder's statement.

15. It was reasonable for WMC to advise its shareholders on the issue. In the Xstrata bidder's statement the issue of Rights was not raised until page 44 under "Appendix 1 – Formal terms of the offer" in which the bidder's statement stated, inter alia, "By accepting this offer you undertake to transfer to Xstrata Capital not only the WMC shares to which the offer relates but all *Rights* attached to the WMC shares" {*emphasis added*}. Later at page 47 under "5 Payment of consideration" the bidder's statement stated that "Xstrata Capital will deduct from the consideration otherwise due to you the amount … of those Rights". WMC shareholders then were required to find the Glossary at page 40 to determine the definition of the Rights referred to.

16. However, WMC's statements in relation to the issue of the possible recoupment by Xstrata from the cash payments of any Rights retained by WMC shareholders went beyond merely informing WMC shareholders of the facts. The Panel decided that the disclosure on page 4 of the WMC Target's Statement was misleading because:

    (a) the use of the terms "'Headline' offer" and "'Effective' offer" were confusing and inappropriate and implied that-the stated price of the Xstrata offer was misleading;

    (b) it implied that the value of Xstrata's offer was less than $6.35 per share; and

    (c) the page was headed "Your Directors believe that Xstrata's Offer is materially inadequate" and then directed shareholders to consider the figure of $5.85 as the "effective" value of that offer.

17. In fact, WMC shareholders would, under the then terms of the Xstrata offer, always receive $6.35 for their WMC shares, either directly from Xstrata or when the Distributions and the adjusted Xstrata offer consideration were added together, as they clearly should have been.

18. The Panel acknowledges that it is common, and indeed often essential, for bidders and target companies to explain the treatment of distributions under a takeover offer in their respective disclosure documents.[2]

19. However, the disclosure at page 4 had the capacity to mislead, rather than ensure that shareholders were properly informed. If WMC had wished to clarify this issue, it could have drawn attention to the relevant clauses from Xstrata's offer and advised shareholders that they would not receive both the $6.35 offered under Xstrata's offer **and** the anticipated Distributions (i.e. they would not receive a total amount of $6.85).

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[2] The Corporations Act at sections 619(2)(b) and 650B(1)(g) recognises and addresses some of the issues that are likely to arise in relation to dividend entitlements during takeover bids. ASIC has also published Policy Statement 163 which sets out ASIC's policy for granting analogous relief from section 621(3)where a dividend is paid in the period between a pre-bid purchase and the making of takeover offers.

*Comparing apples and oranges*

20. The Panel noted that WMC, in its discussion of the $5.85 which it described as the "'effective' offer" for WMC shareholders' shares, described the $5.85 as being the amount that Xstrata was paying for the "future" of WMC. WMC justified this analysis by asserting that WMC shareholders had already earned the entitlements to the Distributions. In considering the statements in the WMC Target's Statement, the Panel noted that dividends and capital returns need not necessarily be related to past performance so WMC's assertion that its shareholders had "earned these entitlements" was not immediately obviously supportable. In response, WMC submitted to the Panel that all of the funds for the Distributions were to be made from cash already accumulated by WMC as a result of its operations during 2004, and therefore the statement about WMC shareholders having "earned the entitlements" was in fact supportable.

21. However, regardless of that, if WMC had wished to advise its shareholders about the "future" component of Xstrata's offer, it would have been appropriate to ensure that any consideration by WMC shareholders of the "effective" or "future" value of the Xstrata offer was in comparison to a similarly adjusted "effective" or "future" value of the Grant Samuel valuation.

22. On that basis, the comparison between the so-called "effective" offer of $5.85 and the historical share price of $5.98 was also a comparison of apples with oranges; any comparison should have applied a similar discounting to the $5.98 price as that applied to derive the "effective" offer of $5.85.

*Comparison with historic share price*

23. Following on from the description of the "effective" amount Xstrata was offering for the "future" value of WMC, the WMC Target's Statement compared the $5.85 "effective" offer value to the "highest closing price at which WMC shares traded in the 12 months prior to the announcement of Xstrata's original proposal".

24. If WMC had wished to compare the Xstrata offer to historic trading prices prior to announcement of the Bid, a far more relevant comparison would have been to trading prices closer in time to the Bid being announced[1]. The Panel does not wish to be prescriptive about the choice of share price for such comparisons. A target may choose a share price on a particular day or the average price over a period of time. That target must ensure, however, that the price is relevant to the offer and the relevant date is clearly identified.

25. The Panel considers that comparing the Xstrata bid price with a WMC share price (in this case $5.98 on 6 January 2004, which yielded the most favourable comparison for WMC) which was close to twelve months old, when used in isolation and with no proximate explanation in the WMC Target's Statement as

[1] The Panel notes that the Grant Samuel report refers to a share price of $5.13 immediately prior to announcement, and a weighted average share price of $5.06 for the three months preceding the announcement.

to why it was relevant at the time of the issue of the WMC Target's Statement, was unlikely to be useful to WMC shareholders.

26. While WMC did clearly state that the figure was the highest WMC share price over the previous twelve month period, there was no clear or explained basis for using such an old figure in isolation, other than it being the highest price in that period. There was also no indication of the actual date of the market price used. The Panel considers the use of such an old price in isolation will normally run a severe risk of constituting unacceptable circumstances.

### Correction required

27. The Panel considered that the effect of the graph and following paragraph on page 4 was sufficiently misleading to require corrective disclosure directing shareholders to disregard that information on page 4 and provide replacement information which was limited to that required to properly explain the treatment of distributions under the terms of Xstrata's offer.

28. However, the Panel considered that the disclosure on page 4, when taken either separately or together with the disclosure on page 5, did not actually invite a direct comparison of the $5.85 figure with the Grant Samuel valuation. The Panel noted that page 5 reverted to the use of the $6.35 figure when comparing Xstrata's offer to the Grant Samuel valuation. Therefore the Panel did not require any adjustment to the presentation of the Grant Samuel valuation.

### Presentation of Grant Samuel valuation

*References to Grant Samuel report*

29. The Panel did not consider the references to the Grant Samuel report and the Grant Samuel valuation in the front section of the WMC Target's Statement to be misleading.

30. The references to the Grant Samuel report which were the subject of complaint in the Xstrata Application were limited to repetitions of either or both of Grant Samuel's conclusion (i.e. that the offer was neither fair nor reasonable) and its valuation (between $7.17 and $8.24 per share). These were statements of fact in relation to the Grant Samuel report, and were not misleading. Page 5 of the WMC Target's Statement informed WMC shareholders that a complete copy of the Grant Samuel report was contained in Annexure A of the WMC Target's Statement.

31. The Panel considered that it may have been clearer, and better practice, when making references to the Grant Samuel valuation in the front section of the WMC Target's Statement, for WMC to give a clear and proximate reference to the very useful summary of the Grant Samuel report (i.e. Grant Samuel's letter to WMC dated 22 December 2004) which is set out in the front of the Grant Samuel report in the WMC Target's Statement. The summary clearly explained that the Grant Samuel valuation was commissioned in the context of a takeover offer by a bidder with an Australian presence, and that synergies and cost

savings available to such a bidder had been taken into account in that valuation.

*Grant Samuel valuation presented as a Stand-alone valuation*

32. Xstrata complained in its Application that the WMC Target's Statement was misleading in its presentation of the Grant Samuel valuation of $7.17 - $8.24 per WMC share, in not clearly and consistently explaining that the Grant Samuel valuation was not a "stand-alone" valuation. Xstrata said that its Application was not on the basis that the Grant Samuel valuation was inappropriate, or that the method used by Grant Samuel was unusual. Rather the complaint that it was making in the Xstrata Application was in relation to the presentation of the valuation.

33. The Panel did not accept Xstrata's submission that the Grant Samuel valuation was presented, either in the front section of the WMC Target's Statement or otherwise, as a "stand-alone" valuation.

34. It is difficult to see why WMC shareholders would have formed the impression that the Grant Samuel valuation being presented to them was a "stand-alone" valuation. Indeed, it would seem more likely for shareholders to expect the Grant Samuel valuation to be exactly as it is, given the purpose of the report was to advise WMC shareholders whether or not the Xstrata offer was fair and reasonable.

35. The Panel considered that the limited reproduction of Grant Samuel's conclusions and valuation in the front section of the WMC Target's Statement was not sufficiently detailed to give a shareholder any real impression one way or the other regarding the methodology used by Grant Samuel. Any shareholder who was uncertain about the methodology used by Grant Samuel would be able to turn to the appropriate disclosure, namely the Grant Samuel report and the useful summary.

*Stand-alone valuation critical to WMC shareholders*

36. Xstrata also submitted that a "stand-alone" valuation was critical information required by WMC shareholders to make an informed assessment whether or not to accept Xstrata's offer. The Panel did not accept Xstrata's submission. Such a valuation may have been relevant if the report had been commissioned in the context of a takeover offer by a bidder who was not able to access the potential cost savings and synergies, or if Grant Samuel had considered that a rival offer from such a takeover bidder was sufficiently likely to be useful to WMC shareholders in the context; but that was not the case in relation to the Xstrata offer. The Panel noted that Xstrata had made its own calculation of the value attributable to cost savings and synergies mentioned in the Grant Samuel Report, which it publicised in part through the Xstrata Release of 4 January.

**Premium for control**

37. Xstrata submitted that because Grant Samuel had stated in its report that the values it had determined incorporated a premium for control, Grant Samuel

must have determined a value for that premium and should disclose both the value and the method by which it calculated that premium.

38. The Panel accepted Grant Samuel's submission that it did not add any separate amount of value for a premium for control to its valuation.

39. The reference to "premium for control" in the final paragraph on page 51 of the Grant Samuel report clearly states that because the valuation is an estimate of full underlying value, it inherently incorporates any premium for control, so that there is no basis for adding a further premium for control on top of Grant Samuel's estimated value. This is in contrast to valuations where a premium for control is added to a base figure relating to a trading multiple to arrive at the value.

40. In the context of the valuation methodology used by Grant Samuel, the Panel considers the discussion of premium for control in the body of its report appropriate (however, a suitable reference in the summary would have been useful to WMC shareholders).

**Commodity Price and Exchange Rate Assumptions**

41. Xstrata objected to Grant Samuel using earnings multiples based on the WMC directors' forecasts in checking the validity of its valuation. Xstrata complained that the commodity price assumptions used by the WMC directors were materially higher than those used by Grant Samuel and that the A$ exchange rate used by the WMC directors was lower than the rate used by Grant Samuel. Xstrata argued that the use of the WMC directors' forecast resulted in the calculation of lower multiples than would have been the case had Grant Samuel's own profit forecasts been used, and that gave the impression that Grant Samuel's valuation was more conservative than it in fact was.

42. In both the summary letter and the body of its report, Grant Samuel stated that it had "cross checked" its Discounted Cash Flow (**DCF**) valuation by comparing the earnings multiples derived from its valuation against earnings multiples for a range of large diversified resources companies. Grant Samuel stated that it believed that the earnings multiple comparisons supported the valuation of WMC in Grant Samuel's value range.

43. Grant Samuel did not expressly state in its report that it had used the WMC directors' forecast in deriving the earnings multiples it compared against the market based earnings multiples.

44. Grant Samuel submitted that the assumptions used in the WMC directors' forecast were consistent with those used by market analysts. Xstrata however disputed this and provided a table of analysts' assumptions to support this submission. The Panel considered that this table showed that a broad range of assumptions had been used by analysts and that there did not appear to be a clear consensus among them. Nor did they necessarily correlate with the forecasts used by the WMC directors.

45. The Panel would normally expect the earnings multiples used in a cross check to be internally consistent, that is to be derived by dividing the valuation by the profit figures from the same model which calculated the valuation. The primary purpose of calculating the earnings multiples is to assess the assumptions used in the DCF. If the earnings multiples are unusually high or low, it indicates that the assumptions used in the DCF may be too aggressive or too conservative.

46. If Grant Samuel had wished to compare the earnings multiples derived from its valuation against earnings multiples for comparable companies, it would have been preferable for it to calculate the earnings multiples using the earnings forecast from its own model and *then* consider how to relate them to the market multiples. It was confusing and potentially misleading for Grant Samuel to change the way the earnings multiples were calculated without disclosing that it had done so and clearly explaining that this had the effect of reducing the earnings multiples used in the cross check.

47. On balance, however, the Panel did not consider that Grant Samuel's earnings multiple analysis was misleading to the extent that it constituted unacceptable circumstances. First, the table was in the body of Grant Samuel's report and was not displayed prominently at the front to the target's statement document. Second, the use of earnings multiples was stated to be merely a cross-check on the primary valuation. Third, Grant Samuel gave the following warning on page 51 of the report, cautioning readers about the earnings multiple analysis:

> *"The multiple analysis needs to be assessed with some caution … the earning forecasts for WMC and the comparable companies (upon which the multiple analysis is based) do not necessarily incorporate identical assumptions regarding commodity prices and exchange rates."*

48. Fourth, and crucially, neither Grant Samuel nor WMC referred to the earnings multiple analysis in any other part of the WMC Target's Statement in support of the valuation or in rejection of the Xstrata offer.

49. If Xstrata remained of the view that it would be useful for shareholders to have a multiple analysis of Grant Samuel's valuation using different assumptions, then it was open to Xstrata to publish its own analysis. However, consistent with the Panel's discussion above, the basis of the analysis would have to be properly explained to ensure that it was not done in a misleading manner.

## CONSIDERATION OF ISSUES BY THE PANEL – WMC APPLICATION

### Criticism of Grant Samuel valuation and recalculation without synergies

50. As indicated above, the Panel did not accept Xstrata's submission that the "stand-alone" value of WMC was "critical" information required by a WMC shareholder to make the investment decision described in section 638(1) in relation to Xstrata's offer.

51. However, the Panel did not consider that it followed from this in any way that presenting WMC shareholders with a value for WMC which did not take

account of the synergies and cost savings incorporated in the Grant Samuel valuation would be, of itself, misleading. The Xstrata Release made it clear that the value that Xstrata had calculated and alluded to did not take account of those cost savings and synergies identified in the Grant Samuel report. The Panel notes that neither WMC's nor Grant Samuel's submissions contained any compelling evidence that Xstrata's representation of this "stand-alone" value was inaccurate, due to miscalculation or otherwise.

52. If WMC was concerned that WMC shareholders may misapply the "stand-alone" valuation contained in the Xstrata Release, it was open to WMC to reiterate and publicly explain its view that such a valuation is not relevant to WMC shareholders in assessing Xstrata's offer.

**2004 Profit Forecast**

53. As noted above, WMC had published an announcement on 9 December 2004 stating that its projected profit for 2004 was likely to be A$1.3 billion. The announcement went on to note that the figure included a number of one-off items. On 4 January, Xstrata published an announcement responding to the publication of the WMC Target's Statement. In its 4 January announcement, Xstrata stated that the WMC Target's Statement contained surprising advice that WMC's profit for 2004 on a normalised basis would only be A$697 million.

54. The Panel considered that the figures regarding WMC's 2004 profit reporting set out in the Xstrata Release were consistent with the primary information set out in the WMC Target's Statement. On that basis, the Panel did not consider that the statements in the Xstrata Release were likely to mislead WMC shareholders. The Panel also considered that the reporting regarding 2004 profit in the WMC Target's Statement was essentially consistent with the earlier announcement by WMC on 9 December 2004.

55. However, the Panel notes that the use of phrases such as "contains some surprises" and "is now only" in the Xstrata Release unhelpfully infer that there had been some change in WMC's financial position since the 9 December announcement or that WMC withheld information from the market and shareholders in its 9 December announcement. The Panel did not consider either inference valid. It considered that any potential confusion was alleviated by a review of the primary information in the WMC Target's Statement or the 9 December announcement– the Xstrata Release in fact brought this section of the WMC Target's Statement to WMC shareholders' attention. To the extent that WMC considered that any confusion may have persisted, it was open to WMC to explain the relation of its 9 December 2004 announcement to the subsequent disclosure in the WMC Target's Statement.

56. The Panel also noted that WMC's 9 December press release prominently disclosed an upgrade of 2004 earnings outlook to $1.3 billion. Although it also disclosed the one-off items included in the announced figure it did not disclose the normalised earnings figure, which could only be calculated from the information in the release by making a number of assumptions. It may have

been more useful to WMC shareholders for WMC to have also clearly disclosed the normalised figure at the time it announced the gross earnings figure.

**Decision and supplementary target's statement**

57. On 25 January 2005, the Panel wrote to parties advising them of its view in relation to the above issues and stating that it was minded to make a declaration of unacceptable circumstances and final orders to remedy the unacceptable circumstances it had identified in relation to the "effective offer" statements in the WMC Target's Statement.

58. However, the Panel advised that it was prepared to accept a suitable undertaking by WMC to correct the WMC Target's Statement. The Panel was prepared to accept corrective disclosure, in the form of a supplementary target's statement, which:

    (a) advised WMC shareholders that the information provided on the existing page 4 of the WMC Target's Statement may have a misleading effect, and should be disregarded;

    (b) explained the proposed treatment of distributions under Xstrata's takeover offer, without using either a graphical representation of the proposed Distributions or terms such as "effective" or "headline" offer;

    (c) did not undertake any comparative analysis using historical share price information; and

    (d) was released to ASX as soon as possible after the Panel had approved its form and was sent to WMC shareholders either with WMC's next dispatch of communications, or no later than two weeks prior to the closing date of Xstrata's offer (whichever was earlier).

59. The Panel considered it important that the corrective disclosure be sent to WMC shareholders (in addition to being announced) with sufficient time for them to make a decision whether to accept Xstrata's offer, because the misleading material which is required to be corrected is already in the physical possession of those shareholders.

60. WMC offered to give an undertaking which met the Panel's requirements, and to prepare a draft supplementary target's statement for the Panel's review. Based on the undertaking given by WMC, the Panel concluded its proceedings in relation to both applications on the basis that it was not in the public interest to make a declaration of unacceptable circumstances.

61. The Panel made no costs order.

**Nerolie Withnall**
**President of the Sitting Panel**
**Decision dated 27 January 2005**
**Reasons published 1 April 2005**